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IN THE

Supreme Court of the United States

October Term, 1968

No. 427

JOHN DANIEL OWENS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit entered in the above case on June 21, 1968.

CITATIONS TO OPINIONS BELOW

The decision of the District Court for the Northern District of Oklahoma is not reported. The opinion of the Court of Appeals for the Tenth Circuit printed in the appendix hereto is reported in ___ F. 2d ___.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

(1) The local Board proceeded under an erroneous view of the law in denying Petitioner's request for a IV-D classification as a minister.

(2) The local Board failed to follow the rule of law laid down by the United States Supreme Court in *Dickinson* v. *United States*, 346 U. S. 389.

(3) The Selective Service file of the Petitioner did not contain the complete minutes of the local Draft Board's meetings and the trial Judge, therefore, was unable to determine whether the procedures followed by the local Board were in conformity with the procedural regulations, statutes and constitutional requirements.

STATEMENT

The Petitioner, a conscientious objector opposed to combatant and non combatant service in the Armed Forces, was convicted in a non jury trial of violating Section 462 of the Military Training and Service Act, 50 U.S.C.A. App., Section 462. The Judgment of the Court of Appeals for the Tenth Circuit affirmed the Judgment of the United States District Court for the Northern District of Oklahoma.

The local Draft Board proceeded under an erroneous view of the law in denying the Petitioner's request for a IV-D classification as a minister. The record shows that one of the Board members in questioning Petitioner's claim for a minister's exemption stated to Petitioner "Where is your church?" and "How much do you get paid?". These two

questions indicate that the Board was proceeding under the erroneous view that in order for the registrant to qualify for a IV-D classification, he must have a church building and must be paid a salary as a minister. The law does not require a person claiming a minister's classification to fall within the traditional concepts of a minister of religion. The Petitioner was a qualified practicing minister of the Jehovah's Witnesses and was entitled to a IV-D classification. *Dickinson* v. *United States*, 346 U. S. 389.

As pointed out by the Circuit Court of Appeals for the Ninth Circuit, in the case of *Gatchell* v. *United States*, 378 F. 2d 287, where the local Board proceeds under an erroneous view of the law, its decision denying a IV-D classification is without basis in fact and the order to report is, therefore, invalid.

The record in this case further shows that the Selective Service file of the Petitioner did not contain the complete minutes of the local Board's meetings and the trial Judge, therefore, could not from the Selective Service file introduced into evidence by the government, make a valid determination as to whether the procedures followed by the local Board were in conformity with the procedural regulations, statutes and constitutional requirements. The Circuit Court of Appeals, in its opinion, merely stated that it agreed with the trial Judge that the minutes of the meetings were neither necessary or useful. It is submitted that, in order for the trial Judge to determine whether the procedures followed by the local Board were in conformity with the procedural regulations, statutes and constitutional requirements, the Selective Service file must include the minutes of meetings of the local Board.

The evidence in this case clearly establishes a *prima facie* case on behalf of the Petitioner for a minister's exemption. The order for Petitioner to report was, therefore, invalid and the conviction should be reversed.

REASONS FOR GRANTING THE WRIT

The Judgment of the District Court, as affirmed by the Court of Appeals for the Tenth Circuit, is contrary to the rule of law laid down by the United States Supreme Court in the *Dickinson* case and also presents a conflict with the rule of law laid down by the Circuit Court for the Ninth Circuit in the *Gatchell* case. This conflict should be clarified by the United States Supreme Court.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

Filed United States Court of Appeals, Tenth Circuit, Jun. 21, 1968. William L. Whittaker, Clerk.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MAY 1968 TERM,

No. 9910

JOHN DANIEL OWENS, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Robert S. Rizley for Appellant.

Hubert H. Bryant (Lawrence A. McSoud and Robert P. Santee with him on brief) for Appellee.

Before MURRAH, Chief Judge, PICKETT and SETH, Circuit Judges.

MURRAH, Chief Judge

Appellant, Owens, a Jehovah's Witness. was classified by his Local Draft Board as I-O, a conscientious objector op-

posed to combatant or noncombatant service in the Armed Forces. He subsequently requested a IV-D reclassification as a minister of religion, exempting him from all training and military service whatsoever. 50 U.S.C.A. App. §456(g). His local Board denied his request and ordered him to report for a civilian work assignment in lieu of induction. Upon refusal, he was convicted in a non-jury trial of violating §462 of the Military Training and Service Act, 50 U.S.C.A App. §472. We affirm the judgment.

The essential facts are undisputed. Owens was raised as a Jehovah's Witness. He registered with his Local Draft Board in Miami, Oklahoma, in 1964, claiming exemption from combatant and noncombatant military service as a conscientious objector. His local Board gave him a 1-S(H) high school classification until his graduation, at which time he enrolled in college and was given a 2-S college deferment. A year later he ceased to be a full-time student, and his classification was changed to I-A, available for military service. Upon request, Owens was permitted to personally appear before his local Board in November, 1965. He again asked to be classified as a conscientious objector, but the Board refused to reopen his classification. Owens appealed, and his file was reviewed by the Appeals Board, who tentatively determined that he was not entitled to a I-O classification. His file was then forwarded to the Department of Justice for an advisory recommendation. The Department of Justice advised that his conscientious objector claim should be sustained, and thereafter, in January 1967, the Appeal Board unanimously classified him as I-O.

Owens received a "special report for class I-O registrants", asking him to submit three types of approved civilian work he would perform in lieu of induction. The special form was returned uncompleted, and was accompanied by a letter in which Owens, for the first time, requested a

IV-D classification as a minister of religion. He stated in the letter that a change had occurred in his status since late 1966; that he had been appointed Bible study conductor, a position requiring weekly meetings with a portion of the congregation for Bible study; that he has been assigned to deliver one-hour sermons to the various Jehovah's Witness congregations in the Miami circuit; and that he now devoted "more than twice the hours to the ministry than * * * before."

The local Board apparently considered the request but declined to reopen the classification. Owens was notified of the Board's decision, and was advised of the three types of civilian work which were available to him. He replied that he would not perform any type of civilian work in lieu of induction. On May 4, 1967, the Board held a meeting with Owens to reach an agreement on the type of work he would perform. At the meeting, he signed a statement that he refused to do civilian work in lieu of military service. The Board found that Owens was qualified to do general hospital work, and ordered him to report to his local Board on June 26, 1967, for instructions to proceed to the University of Kansas Medical Center. When he failed to report, he was duly charged and convicted.

The burden of establishing the right to a particular exemption is upon the registrant. See Dickinson v. United States, 346 U. S. 389. In the recent cases of Kuykendall v. United States, 387 F. 2d 594; Fore v. United States, 10 CA, Feb. 1968, ___ F. 2d ___, we epitomized the criteria which must be met before the registrant is entitled to the ministerial exemption, and those standards need not be reiterated here. The local Board is the first judge as to whether the criteria have been satisfied, and our scope of review of the Board's classification order is narrowly limited to determining whether there is a "basis in fact" for the classifica-

tion. See Estep v. United States, 327 U. S. 114; Dickinson v. United States, supra; Bradshaw v. United States, 242 F. 2d 180. Kuykendall v. United States, supra; Fore v. United States, supra. In making this determination, the court may take into account the possibility that the local Board proceeded under an erroneous view of the law. See Sicurella v. United States, 348 U. S. 385; Gatchell v. United States, 378 F. 2d 287.

Owens' initial contention is that the local Board may have proceeded under an erroneous view of the law in denying his request for a IV-D classification as a minister. He testified that at the May 4 meeting, which was held for the purpose of reaching an agreement as to the type of civilian work he would perform, he mentioned that he "would [again] like to discuss * * * my claim for minister's exemption." One of the Board members responded: "Where is your church" and "How much do you get paid?" Owens argues that these two questions indicate that the Board was proceeding under the erroneous view that in order for a registrant to qualify for a IV-D classification, he must have a church building and be paid a salary as a minister. There is no statute or regulation requiring the local Board to make findings of fact or conclusions of law or indicate reasons for its decisions. See 32 C.F.R. §1626.27(a); Gatchell v. United States, supra. If the Board states reasons for its action, however, and these reasons are found to be legally insufficient to support the Board's classification, the classification should be found to be without a basis in fact. This is true even if an independent search of the record discloses an adequate basis in fact to support the action of the Board, for there would be the risk that the impropriety of the stated reasons tainted the Board's decision. See Gatchell v. United States, supra. But, where, as here the Board discloses no reason for the challenged classification or for failing to reopen the

classification, we will assume the Board relied upon whatever factual basis is reflected in the record, if any.

Owens contends that he supplied the Board sufficient evidence to establish a prima facie case for the ministerial exemption. If this be true, then the Board's refusal to reclassify invalidates the order to report. See Fore v. United States, supra. The submitted information showed that Owens spends approximately 160 hours per month employed as an assistant operator for Eagle-Pitcher Company; that although he is not a Pioneer Minister[1], he devotes sixty to eighty hours per month in his duties as a Jehovah's Witness; that he instructs others in the study of the Bible; that he regularly calls on persons from door to door in connection with Bible study; that he is enrolled in the theocratic ministry school; and that he makes public talks to various congregations. Although Owens apparently is an active and devout member of the Jehovah's Witnesses, we do not think the record facts establish a prima facie case for the granting of an IV-D classification. See Kuykendall v. United States, supra. The Board's refusal to reopen was not erroneous, and the I-O classification was valid.

It is next contended that the conviction should be reversed because the Government failed to prove that he would have been inducted prior to the time he was to report to the University of Kansas Medical Center. Reliance is placed upon 32 C.F.R. 1660.20, which provides that no order for civilian work shall be issued "prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O." This Section merely "refers to the date of induction of the hypothetical person, classified I-A, and proceeding normally, without appeal, to

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1. To attain the status of a Pioneer Minister, a Jehovah's Witness must devote at least 100 hours per month to preaching.

induction." Fore v. United States, supra. In our case the Clerk of Owens' local Board testified that if Owens had remained in the I-A classification from the time he was registered, he would have been inducted in May, 1966, more than one year before he was ordered to report to the hospital. We think this testimony satisfies the requirement of the regulation.

Finally, Owens claims that his conviction should not be upheld because his selective service file did not contain the complete minutes of the November 1965 meeting, and the trial judge, therefore, was unable "to determine whether the procedures followed by the local Board were in conformity with procedural regulations, statutes and constitutional requirements." The short answer is that the November meeting was not concerned in any way with Owens' classification as a minister of religion. Indeed, at that time he had not even mentioned that he was entitled to such an exemption. The meeting was concerned merely with a request by Owens that his I-A classification be changed to I-O, a change which was subsequently granted. We agree with the trial judge that the minutes were neither necessary nor useful.

The judgment is affirmed.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on June 21, 1968 (Pet. 5). On July 22, Mr. Justice White ordered the time for filing a petition for a writ of certiorari extended to, and including August 21, 1968. The petition, filed on August 22, 1968, is out of time under Rule 22-2 of this Court. There is in any event no occasion to review petitioner's conviction and the five-year sentence imposed.

1. Evidence at the trial and in petitioner's Selective Service file (R. 179-273) shows that in early 1964 petitioner, then 18, filed a Selective Service Classification Questionnaire with his local board, in which he claimed exemption as a conscientious objector (R. 266-270). The local board gave him a I-S(H) classification so he could finish high school, and later a 2-S classification so he could attend college (R. 19-21, 273). In the fall of 1965, when petitioner was no longer attending college, he was re-classified I-A (availiable for service) (R. 21, 273).

On November 8, 1965, petitioner made a personal appearance before the local board and claimed he should be re-classified I-O (conscientious objector) (R. 245-247). The board refused to reopen the I-A classification and petitioner appealed. In January 1967 the appeal board gave him a I-O classification (R. 272).

Soon thereafter petitioner returned uncompleted to the local board a special report form asking him to submit three types of approved civilian work he would perform in lieu of induction (R. 208-211), and submitted a letter in which, for the first time, he requested a IV-D (minister) classification. In the letter petitioner said that a change had occurred in his status since late 1966; that he had been appointed Bible study conductor, which required weekly meeting with part of the congregation; that he had been assigned to deliver one-hour sermons to various Jehovah's Witness congregations in the Miami circuit; and that he now devoted "more than twice the hours to the ministry" than he had before (R. 206-207). At that time peti-

tioner worked a full 40-hour week in his secular employment as an assistant operator for Eagle-Pitcher Company, and sometimes worked overtime (R. 64-65, 99-100, 213). He devoted between 60 and 80 hours per month to his ministry duties as a Jehovah's Witness (R. 78-79). His goal was to be a "pioneer", which required a minimum of 100 hours per month as a full time minister, but he never did apply for this (R. 89-90). Petitioner was "not over any church" (R. 109), did not baptize anyone (R. 110), and did not perform marriages or conduct funerals (R. 120).

The local board considered petitioner's request for a IV-D classification, but on March 6, 1967 it declined to reopen the I-O classification (R. 272). Petitioner was advised of three types of work which were available, but replied that he would not perform any civilian work in lieu of induction (R. 27-28, 272). Petitioner was found qualified to do general hospital work, and the board ordered him to report on June 26, 1967 for instructions to proceed to the University of Kansas Medical Center. He failed to report (R. 29-30, 272), and was charged and convicted for violation of Section 462 of the Military Training and Service Act, 50 U.S.C. App. 462.

2. There was clearly a basis in fact for the local board's denial of petitioner's request for a IV-D classification as a minister. In *Cox* v. *United States*, 332 U.S. 442, this Court rejected the contention that the belief of all members of a sect that they are ministers in itself entitles each of them to exemption from service as such. It pointed out in *Dickinson* v. *United States*, 346 U.S. 389, 394, that the ministerial exemp-

tion was intended by Congress to be a narrow one, "for the leaders of the various religious faiths and not for the members generally." The denial of ministerial exemption to lower echelon Jehovah's Witnesses such as petitioner here has been consistently upheld. *E.g.*, *United States* v. *Sturgis*, 342 F.2d 328 (C.A. 3), certiorari denied, 382 U.S. 879; *United States* v. *Stewart*, 322 F.2d 592 (C.A. 4); *Fitts* v. *United States*, 334 F.2d 416, 418-422 (C.A. 5); *United States* v. *Willard*, 312 F.2d 605 (C.A. 6), certiorari denied, 372 U.S. 960; *United States* v. *Norris*, 341 F.2d 527 (C.A. 7), certiorari denied, 382 U.S. 850.

3. Petitioner's two other contentions are also basically factual. The court of appeals recognized the authority of *Gatchell* v. *United States*, 378 F.2d 287 (C.A. 9), for the proposition that a local board may be said to have acted "without basis in fact" where it is shown to have proceeded under an erroneous view of the law. In *Gatchell*, an appeal board had given specific, invalid reasons for refusing to reopen the registrant's classification. Here, on the other hand, petitioner relies solely on questions he asserts were asked him by one board member when he asked the local board to reconsider his claim for ministerial exemption: "Where is your church?" and "How much do you get paid?" The trial and appellate courts could properly determine that these questions did not establish an erroneous view of the law on the part of the local board.

The courts could also determine that the record before them was complete on the issue of petitioner's qualification for ministerial exemption. The clerk of

the local board testified at trial that she did not have minutes of the board action of *November 8, 1965* (R. 38-39). Petitioner's counsel asked that the minutes be produced (R. 39). The trial court stated, "I don't think her minutes would be necessary or useful. We can let her get them if you think it would be of help, Mr. Rizley (petitioner's counsel), but I don't see where it would." Petitioner's counsel said "* * * it is a technical defense upon which we have to rely" (R. 44). The court proceeded without production of the minutes (R. 49). The November 8, 1965 meeting was concerned with petitioner's request (later granted) that his I-A classification be changed to I-O; it did not involve his request for a IV-D classification as a minister, made for the first time in February 1967. Since petitioner obtained all he asked for at the November 8 meeting, he can hardly complain of non-production of the minutes of that meeting. Both courts below correctly ruled that "the minutes were neither necessary nor useful" (Pet. App. 10).

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1968.

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